SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1228

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, THE WIFE OF SAID ROBERT R. WILLIAMS, AND FORMERLY ANNA M. PERRY, JOHN W. DuBOSE, AND RALPH B. FERGUSON,

Petitioners,

vs.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. ALBERT PALLOT,
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INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinion below	2
Jurisdiction	2
Summary statement of matters involved	2
Questions presented	4
Reason for granting the petition	5
Brief in support of petition	7
Opinion below	7
Statement of grounds on which jurisdiction of Supreme Court is invoked	8
Statement of the case	8
Argument	12
First question: Did District Court have Federal jurisdiction?	12
Second question: Did plaintiffs have substantive right to recover of defendant?	27
Conclusion	30
Appendix	32

Table of Cases Cited.

Bogart v. *Southern Pacific Co.*, 228 U. S. 137, 57 L. Ed. 768, 33 Sup. Ct. 497	21
Camp v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 39 Sup. Ct. 478	21
Clearwater v. *Meredith*, 21 How. 489, 16 L. Ed. 201.	19,21,28
Crecelius, et al. v. *New Albany Machine Mfg. Co.*, 4 Fed. (2nd) 369	20
Davis v. *First National Bank & Trust Company in Orlando*, (Fla.) 150 So. 633	15, 28
Erie Railroad Company v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817	15

Page

Fidelity & Deposit Company of Maryland v. *Aultman*, (Fla.) 50 So. 991 28
Florida School-Book Depository, Inc., v. *Liddon*, (Fla.) 153 So. 902 ..... 13, 27
Gilman v. *Rives*, 10 Peters 298, 9 L. Ed. 432 28
L. & N. R. R. Co. v. *Ide*, 114 U. S. 52, 29 L. Ed. 63, 5 Sup. Ct. 735 25
Martin v. *Barth*, 25 Fed. (2nd) 95 20
Nelson v. *Ziegfeld*, (Fla.) 131 So. 316 ..... 15, 28
Pickersgill v. *Lahens*, 15 Wall. 140, 21 L. Ed. 119 .... 14, 28
Shields v. *Barrow*, 17 How. 130, 15 L. Ed. 158 17
United States v. *Sherwood*, 85 L. Ed. 696, 61 Sup. Ct. 767 17
Williams v. *Rickard*, 26 Fed. (2nd) 244 20

STATUTES CITED.

Florida Statute, 4496 C. G. L. 1927 15
Judicial Code, Sec. 50 (28 U. S. C. 111) 5, 17, 28
Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347(a) 2, 8
United States Code Annotated 24, 25

TEXTS CITED.

Corpus Juris 13, 22, 27, 28,
Corpus Juris Secundum 13, 22, 27, 28,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered after rehearing on March 10, 1942, affirming the judgments of the District Court of the United States for the Southern District of Florida, Miami Division,

entered on November 27, 1940 and December 2, 1940, respectively.

Opinion Below.

The opinion of the court below filed January 30, 1942, is reported in 125 Fed. (2d) 208. This opinion is shown on pages 76 to 78, inclusive, of the Transcript of Record. There was no opinion of the court below in connection with its order denying the rehearing filed March 10, 1942.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 43 Stat. 938, 28 U. S. C. A. 347 (a).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed January 30, 1942; Petition for Rehearing was filed February 18, 1942; and rehearing was denied on March 10, 1942. Application for stay of mandate pending application in this Court for writ of certiorari was made, and order staying the mandate until action of this Court upon this application for certiorari is had, was entered on the 21st day of April, 1942.

Summary Statement of Matters Involved.

Several citizens of Florida, respondents herein, and obligees in a Five Thousand Dollar ($5,000.00) supersedeas bond, given in a State court proceedings, sued the surety upon said bond, a Maryland corporation, and one of the respondents herein, as sole defendant in a Florida State court in Miami, Florida (R. 7-13). The said surety removed the case to the United States District Court for the Southern District of Florida, Miami Division, basing the jurisdiction of said district court upon diversity of citizenship (R. 13-15). After the said cause had been so removed, the said surety as Third Party Plaintiff brought

in as Third Party Defendants, the principals in said bond, the petitioners here, who were all citizens of the State of Florida (R. 47-48, also Third Party Complaint R. 16-47). In other words, all of the parties in the said suit in said District Court were citizens of the State of Florida, with the exception of the said surety company which was a Maryland corporation. By the terms of the said bond, the liability upon the part of said surety was joint with, and not several from that of the principals, these petitioners (R. 11-13). Said principals, these petitioners, moved the Federal District Court to remand said cause to the State court for lack of Federal jurisdiction, and also moved said District Court to dismiss the original cause of action because the plaintiffs therein had no substantive right to proceed against one of several joint obligors in the absence of the other obligors jointly liable with the sole defendant, the State law being to this effect (R. 51-53). Both motions were denied by the said District Court and ultimately judgment was entered for the plaintiffs against said surety, and for said surety as Third Party Plaintiff against the Third Party Defendants, these petitioners (R. 58-61). These judgments were affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on the ground that the said surety company had waived the non-joinder of the principals in said bond, these petitioners, as defendants in the original suit, and on the further ground that said principals, these petitioners, could have interposed any defense they had, or the surety company had, and failed to avail themselves of these rights. (See opinion cited above.) This was held by said Circuit Court of Appeals, notwithstanding the fact that said principals, these petitioners, had availed themselves of the right to plead that which the said surety had waived, both by filing the said motion to remand and by filing the said motion to dismiss, and notwithstanding the fact that Rule 14 of the

Rules of Civil Procedure for District Courts expressly grants to Third Party Defendants the right to assert any defense which the Third Party Plaintiff has to the plaintiffs' claim.

Questions Presented.

The fundamental questions presented in this petition are as follows, to-wit:

1. In a suit upon a Five Thousand Dollar ($5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship? This question is set forth verbatim on Pages 69-70 of the transcript.

2. In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the Court disregard the non-joinder of said Third Party Defendants as original defend-

ants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

Simplifying the two questions of law stated above, they mean nothing more or less than the following:

Is there Federal jurisdiction on the ground of diversity of citizenship in a suit against one of several joint obligors where the omitted obligors are citizens of the same State as the plaintiffs and can be personally served, and if there is such Federal jurisdiction, should the suit be dismissed on its merits where the law of the state is to that effect because the plaintiffs have no substantive right to proceed against one of several joint obligors?

Reason for Granting the Petition.

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

Rule 82 of the New Rules of Civil Procedure for District Courts of the United States expressly provides: "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

Prior to the passage of said new rules of civil procedure, the Federal District Courts unquestionably would not have had any jurisdiction in this case.

28 U. S. C. 111 (Judicial Code 50) in substance provides that where a defendant is neither an inhabitant of nor can be found within the district where the suit is brought, the court may proceed without him and his nonjoinder cannot be plead in abatement. The question here presented to this court is really a question of whether or not the Third Party procedure under said new rules can be so used as to give jurisdiction to a Federal District Court where it

did not exist before. The Circuit Court of Appeals for the Fifth Circuit in its opinion has held that the sole defendant can waive the right of the Third Party Defendants to plead their own non-joinder, although said Third Party Defendants will be bound by the judgment against the original defendant. The said Circuit Court of Appeals in the same opinion held that said Third Party Defendants could have plead any defense they had in the original cause of action which in effect makes them parties defendant for the purpose of pleading, but not for the purpose of jurisdiction. There is great confusion upon the jurisdictional question of diversity of citizenship where these third party proceedings are involved. Had the case proceeded against the sole defendant and there had been no third party defendants, the Federal Court would have had jurisdiction to enter a judgment against said sole defendant, it not having plead the non-joinder of those jointly liable with it. But can such sole defendant waive the right of third party defendants to plead their non-joinder, and thereby confer jurisdiction upon the Federal Court so as to bind said third party defendants? In other words, can you bind the third party defendants by the original judgment, and at the same time prohibit them from pleading any defense which the sole party defendant could have plead?

There can be no more important question than this question determining the rights of third party defendants in connection with the original suit, both as to the merits of said suit and as to the jurisdiction of the Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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Petitioners,

vs.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion Below.

The opinion of the court below filed January 30, 1942, is reported in 125 F. (2d) 208. This opinion is also shown in the Transcript of Record at Pages 76 to 78, inclusive. There was no opinion when the Petition for Rehearing was denied on March 10, 1942.

Statement of Grounds On Which Jurisdiction of Supreme Court Is Invoked.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 (a).

This court is asked to review the decision of the Circuit Court of Appeals for the Fifth Circuit, on the ground that said Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court.

The ground on which the jurisdiction of this court is invoked will be discussed more specifically hereinafter when the questions concerned shall have been set forth.

Statement of the Case.

On October 26, 1939, the respondents herein, Kenneth S. Keyes, Alex M. Balfe, and C. D. Van Orsdel, all citizens of the State of Florida, who shall hereinafter be referred to as "plaintiffs", filed suit in a Florida court in Miami, Florida, against United States Fidelity and Guaranty Company, a Maryland corporation, the remaining respondent herein, hereinafter referred to as "defendant", upon a Supersedeas Bond given in a chancery case in a Florida Court, in which said bond the plaintiffs were obligees, and the defendant as surety, and these petitioners, Robert R. Williams, John W. DuBose, Ralph B. Ferguson, and Anna M. Perry, as principals, were obligors (R. 7-13). The obligation upon the part of the obligors in said bond was a joint obligation, and not a several one, by the terms of said bond. The defendant removed its case to the United States District Court for the Southern District of Florida, Miami Division (R. 13-15), said defendant being the sole defendant in the State court. After the cause had been removed to the said District Court, these petitioners were brought

into said cause by said defendant as Third Party Defendants, because of their liability to the defendant in the event it was liable to the plaintiffs. (See Order—R. 47-48, and Third Party Complaint—R. 16-47). These petitioners moved the said District Court to remand the cause for lack of diversity of citizenship, and also moved said district court to dismiss the cause because of lack of substantive right of the plaintiffs to maintain the action (R. 51-53). Both of these motions were denied by the said District Court and subsequently judgment was entered for the plaintiffs against the defendant, and for the defendant against the Third Party Defendants (R. 58-61). This action of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, its opinion and judgment having been made on January 30, 1942 (R. 78-82). Petition for Rehearing was filed on February 18, 1942, and denied without opinion on March 10, 1942 (R. 83-88). These petitioners contend that the said Circuit Court of Appeals erred in affirming the action of said District Court, in denying the motion of these petitioners to remand the suit to the State court for lack of Federal jurisdiction on the ground of diversity of citizenship, and also erred in affirming the action of said district court in not dismissing the said cause of action because of lack of substantive right to proceed upon the part of the plaintiffs.

These contended errors raised the following questions of law, to-wit:

1. In a suit upon a Five Thousand Dollar ($5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several

from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship?

2. In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the court disregard the non-joinder of said Third Party Defendants as original defendants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

Simplifying the two questions of law stated above, they mean nothing more or less than the following:

Is there Federal jurisdiction on the ground of diversity of citizenship in a suit against one of several joint obligors where the omitted obligors are citizens of the same State as the plaintiffs and can be personally served, and if there is such Federal jurisdiction, should the suit be dismissed on its merits where the law of the state is to that effect because the plaintiffs have no substantive right to proceed against one of several joint obligors?

The Circuit Court of Appeals in determining that the said District Court had jurisdiction, said: "It (referring to

the surety company and sole defendant) made no defense on the ground of non-joinder of parties defendant, and thereby waived the point." This was in effect saying that the sole defendant could waive the right of the Third Party Defendants to plead that which the sole defendant had waived, although Rule 14 expressly gives to Third Party Defendants the right to plead any matter which the Third Party Plaintiff can plead. Were it not for this provision in Rule 14, said rule would be unconstitutional as violating the due process clause of the Constitution, in that it would bind Third Party Defendants with the judgment in the original case, and at the same time not give them the privilege of pleading thereto.

The effect of the opinion of said Circuit Court of Appeals also was to confer jurisdiction upon a district court over a suit upon which it had no jurisdiction prior to the passage of the Rules of Civil Procedure for district courts. This is contrary to the express provisions of Rule 82 of said rules.

The said Circuit Court of Appeals in its said opinion also stated: "They, (referring to these petitioners) could have interposed any defense they had." The effect of this reasoning is to make these petitioners parties defendant to the original suit for the purpose of pleading, but not parties defendant for the purpose of determining jurisdiction on diversity of citizenship. Rule 14, of the said Rules of Civil Procedure, does not give the privilege to Third Party Defendants to plead any defense, but only that defense which the Third Party Plaintiff might plead to the original claim.

The above questions presented are very important questions for the reason that they involve the whole Third Party procedure under the New Rules of Civil Procedure for District Courts, and involve the rights of Third Party Defendants, as well as the jurisdiction of the Court upon diversity of citizenship in such cases.

Prior to the passage of the new rules of procedure, one of several joint obligors could be sued, and if he failed to plead the non-joinder of the others, a judgment could be entered against him. This judgment, however, would not bind anyone not a party to the suit. The object of third party proceedings is to bind the Third Party Defendants by the original judgment. In order to do this, such Third Party Defendants must be allowed to plead any matter which the original defendant could plead; otherwise, there would be no due process of law. They cannot be allowed to plead their own defense, however, for this would be in effect allowing them to intervene in a suit in which the plaintiff had not seen fit to make them parties. Now the question comes, if the sole defendant jointly liable with others omitted as parties, waives the right to plead such non-joinder, can you bind the omitted parties under the new rules of procedure without allowing them to plead their own non-joinder in the original suit, even though their joinder might destroy the jurisdiction of the Court.

These questions have never been decided by the United States Supreme Court.

ARGUMENT.

Question No. 1.

In a suit upon a Five Thousand Dollar ($5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District

Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship?

The above question assumes that the bond sued upon is a joint bond. The Circuit Court of Appeals in its opinion says: "The bond does not provide in specific terms whether the obligation of the principals and surety is joint, or joint and several. A reading of the bond leads to the conclusion that the liability of the obligors is joint and several, and this conclusion is borne out by the terms of the several indemnity agreements executed by the principals at the time of the execution of the bond."

This reasoning of said Circuit Court ignores the express words of the bond itself—"The undersigned Principals and Surety firmly bind themselves by these presents." It also ignores the almost universal rule that every contract is a joint contract unless words of severalty are placed therein. There is no statute in the State of Florida making any bond joint and several. We find the following quotation in 11 C. J. S. 426: "At law the presumption is that, where two or more persons enter into a bond without adding language disclosing a different intention, the undertaking is a joint and not a several one. This presumption, however, may be rebutted, and is rebutted, where the bond contains words of severance showing that it was the intention of the parties that it should be several, as well as joint; and under some statutes such obligations are presumed to be joint and several." The same is held at 9 C. J. 37.

The effect of the opinion of the Circuit Court of Appeals totally disregarded the law of the State of Florida as laid down in *Florida School-Book Depository, Inc.*, v. *Liddon*, (Fla.) 153 So. 902. In this case it was held that the meaning of a bond, not a statutory bond, must be determined from a consideration only of the language of the bond. The said bond was not ambiguous in its terms, and, therefore,

required no extrinsic evidence, either oral or written to construe the terms thereof. It was clearly a joint bond upon its face. The said Circuit Court of Appeals in rendering its opinion cited no authority therefor and overlooked entirely the authorities cited by these petitioners.

The said Circuit Court of Appeals by placing in its opinion words raising doubt as to whether or not the bond was a joint one, saying: "this conclusion is borne out by the terms of the several indemnity agreements executed by the principals at the time of the execution of the bond", overlooked and wholly failed to take into consideration the fact that neither the State Court which approved the Supersedeas bond sued upon, or the plaintiffs who sued upon said bond, were parties to said indemnity agreements. In other words, the Circuit Court attempts to construe the bond by agreements to which the obligees in said bond were not a party, and to which the State court which fixed the conditions and kind of bond to be filed, was not a party.

Of course if the bond is a joint and several bond there is no law suit, but neither the respondents nor anyone else has cited any law to this effect, the general law being that they are presumed to be joint unless words of severalty are placed therein.

In *Pickersgill* v. *Lahens*, 15 Wall. 140, 21 L. Ed. 119, an attempt was made by a bill in equity to convert a supersedeas bond on the face of which liability upon the part of the obligors was joint, into a bond wherein the liability upon the part of the obligors would be joint and several. The Court said that where the statute was silent as to whether or not a bond should be a joint, or joint and several bond, either would comply with the statute. The Court used the following words:

> "It is certainly not forbidden, and as the statute is silent on the subject the fair intendment is that either

was authorized, and that the Court had the right to direct which should be given."

In Florida there is no statute either in law or equity concerning any supersedeas bond to be filed in connection with any appeal in any Florida Court which either authorizes, directs, or mentions the bond in connection with the question as to whether or not the same should be joint or several, or both. Under the last cited case where a Court approves the supersedeas bond, as the plaintiffs allege in their declaration was done in the case at bar (Tr. 9, first paragraph) there can be no question either that the bond did not comply with Florida law or that there was any mistake of fact or law in the execution of the same.

Before going into the question of the jurisdiction of the Court, let us first look into the substantive rights of the parties. Under *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, the law of Florida controls as to such substantive rights. Section 4496, of the Compiled General Laws of Florida for 1927 (set out in full in the Appendix to this brief), in substance permits a plaintiff who has sued joint obligors to recover a judgment against the obligors served in the suit where the Sheriff returns that the defendant not served does not reside in the County, and where the judgment notes the fact of such non-service by the Sheriff.

In *Davis* v. *First National Bank & Trust Company in Orlando* (Fla.), 150 So. 633, a judgment was entered against some, but not all of the joint obligors on a note. The Court said:

"* * * since it is made by statute a condition precedent to the right of plaintiff to proceed to any judgment against less than all the defendants sued, strict compliance with the statute is essential to avoid a reversal of the judgment in direct appellate proceedings brought attacking it by writ of error."

The judgment was reversed in this case for not complying with the statute.

In *Nelson* v. *Ziegfeld* (Fla.), 131 So. 316, the plaintiff sued at law only one of two joint obligors, just as was done in the case at bar. The defendant in no manner objected to the non-joinder of the other party jointly liable with him. The lower court directed a verdict for the defendant at the trial of the cause, and the Upper Court affirmed this judgment of the lower court, saying:

> "The obligation being joint, the action to enforcee the obligation must be joint. Proof of a joint obligation will not support an action against one of the joint obligors, wherein the plaintiff alleges a several or single liability against such joint obligor."

So it is clear to be seen that the plaintiffs have no cause of action under the substantive law of Florida, in that their declaration shows upon its face an attempt to hold one of several joint obligors liable. Under the Florida law, one who sues upon a joint obligation must sue all of the joint obligors whether they can be served or not, and even the obligor who cannot be served is not dismissed from the suit. The plaintiff can recover a judgment against one of several joint obligors where all are parties defendant in the suit, and the sheriff makes the proper statutory return showing those obligors not in the judgment did not reside in the County. The Florida rule at all times requires the maintenance as parties defendant in the suit, all of the joint obligors, although judgment might be entered against only some where the conditions in the statute are complied with. This rule allows any obligor to voluntarily appear at any time even though he was not served. This rule clearly recognizes that the controversy is between the obligee on one side and all of the obligors on the other. In Florida, the plaintiff under no circumstances has the substantive right at any time to sue less than all of the joint obligors.

Now let us consider the jurisdiction of the U. S. District Court in this case after the same was removed thereto from the Florida Court.

Rule 82, of the New Rules of Civil Procedure for District Courts of the United States expressly provides: "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

In the case of *United States* v. *Sherwood,* 85 L. Ed. 696, 61 Sup. Ct. 767, the Supreme Court of the United States said:

> "An authority conferred upon a Court to make rules of procedure for the exercise of its jurisdiction, is not an authority to enlarge that jurisdiction, and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723 b, authorizing this Court to prescribe rules of procedure in civil actions, gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of Federal Courts."

28 U. S. C. 111 (Judicial Code 50) in substance provides that where a defendant is neither an inhabitant of, nor can be found within the district where the suit is brought, the Court may proceed without him, and his non-joinder cannot be plead in abatement. This Act was originally passed February 28, 1839. The law prior to February 28, 1839, is discussed in the famous case of *Shields* v. *Barrow,* 17 How. 130, 15 L. Ed. 158. This case is an authority throughout the Courts of America, both State and Federal, upon the question of parties. In this case the Bill of Complaint was dismissed because indispensable parties were omitted. Those omitted were citizens of the same state as the plaintiff, and were actually brought into the suit as defendants in a cross bill. The case is distinguished from the one at bar because it is a suit in equity, and the omitted parties were indispensable parties. In the case at bar, the omitted par-

ties were brought in as Third Party Defendants, whereas, in the *Shields* v. *Barrow* case, they were brought in as defendants to a cross bill. In both cases the omitted parties were citizens of the same State as the plaintiffs. In the *Shields* v. *Barrow* case, the Court defined three classes of parties: Formal, Necessary, and Indispensable. It in substance said that a formal party could or could not be made a party at the option of the plaintiff. A necessary party is one who must be made a defendant unless to do so would destroy the jurisdiction of the Court, or unless such party could not be served. The absence of a necessary party will not affect the decree in any manner. An indispensable party is one without whom no valid decree can be entered for the reason that the decree will affect the rights of the omitted party in some manner. The Court after explaining the difference between the various classes of parties, then stated as follows:

> "In *Cameron* v. *M'Roberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this Court certified: 'if a joint interest vested in Cameron and the other defendants, the Court had no jurisdiction over the cause. * * *'"

In other words, the Court in effect said, that where there is a joint interest in the defendants, the Court is without jurisdiction unless there is a diversity of citizenship between the plaintiff and all of those having such a joint interest. The Court stated that this was the law when the Act of February 28, 1839 was passed. In speaking of this last Act, the Court said:

> "This Act relates solely to the non-joinder of persons who are not within the reach of the process of the Court. It does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction: and so far as it touches suits in equity we understand

> it to be no more than a legislative affirmance of the rule previously established by the cases of * * *."

Summing up the case of *Shields* v. *Barrow*, it simply means that the Act of February 28, 1839, had no effect whatsoever upon equity cases, and so far as equity cases are concerned, was no more than a legislative affirmance of the law as it existed prior to the Act. Such Act, however, did affect common law cases. Prior to the Act there was no authority whatsoever for omitting as a party defendant one of two, or more joint obligors. This Act allowed such omission where the omitted party was not within reach of process of the Court, but the case of *Shields* v. *Barrow* expressly says that this Act did not allow such omission because the citizenship of the omitted party was such as to defeat the jurisdiction of the Court.

The Court in the *Shields* case commenting upon an order of the lower court requiring the omitted parties to be brought in by cross bill, said:

> "It is apparent that if it were in the power of a Circuit Court of the United States to make and enforce orders like this, both the Article of the Constitution respecting judicial power, and the Act of Congress conferring jurisdiction on the Circuit Courts, would be practically disregarded in a most important particular."

In the case of *Clearwater* v. *Meredith*, 21 How. 489, 16 L. Ed. 201, a suit was brought upon a joint obligation against two of three joint obligors. The one omitted was alleged in the declaration not to be a citizen of the State where the suit was brought. It was held in this case that the suit could proceed to judgment, although one of the joint obligors was omitted by virtue of the Statute of February 28, 1839. The Court said:

> "It is well known that the Act of 1839 was intended so to modify the jurisdiction of the Circuit Court as to make it more practical and effective."

The Court furthermore said:

> "Now it is too clear for controversy that the Act of 1839 did intend to change the character of the parties to the suit."

The last two cited cases clearly show that prior to the Act of February 28, 1839, a Federal Court had no jurisdiction in a case against defendants upon a joint liability on the ground of diversity of citizenship, unless there was a diversity of citizenship between the plaintiff and all of the parties jointly liable to him whether they were in or out of Court, and the statute did not change this rule except in cases where persons were not within the reach of the process of the Court; but did enlarge the jurisdiction of the Court in such last mentioned cases. In the case at bar, appellants were within reach of the process of the Court, the statute, therefore, did not enlarge the jurisdiction of the Court, and it had no jurisdiction under the law effective prior to the statute.

Because of the *Shields* v. *Barrow* case, a great number of Federal Courts have adopted the rule that where an indispensable party is omitted as a defendant, and to bring such a party in would defeat the jurisdiction of the Court, then the Court has no Federal jurisdiction. Some of the more recent cases along this line are:

Crecelius, et al., v. *New Albany Machine Mfg. Co.*, 4 F. (2d) 369;
Martin v. *Barth*, 25 F. (2d) 95; and
Williams v. *Rickard*, 26 F. (2d) 244.

These cases adopting this rule, however, are erroneous. A court cannot enter a decree where an indispensable party

is omitted because the decree would affect the rights of a party not in court. In other words, the court does not have power to enter the decree, not because of lack of Federal jurisdiction, but because the decree itself would be void. No court, Federal or State, has any power to enter a void decree as would be the case if an indispensable party were omitted from the suit. The Supreme Court of the United States in the case of *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 57 L. Ed. 768, 33 Sup. Ct. 497, clearly draws the distinction which I have tried to draw above. In this case, a Bill of Complaint was dismissed because an indispensable party was omitted. An appeal was taken direct to the Supreme Court of the United States under the old rule upon the ground that a question of Federal jurisdiction was involved. The Supreme Court said there was no question of Federal jurisdiction involved. The rule that a Court cannot enter a decree where an indispensable party is omitted, is a rule applicable to all courts and does not involve Federal jurisdiction. The bill was properly dismissed.

From the beginning, courts have held that a joint obligor is not an indispensable party in a common law suit upon the joint obligation. This has been held by the United States Supreme Court also.

Clearwater v. *Meredith*, 21 How. 489, 16 L. Ed. 201;
Camp v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 39 Sup. Ct. 478.

Where one of two joint obligors is sued, the court can enter a judgment unless the defendant objects thereto, inasmuch as the omitted obligor is not an indispensable party. But if the defendant in the suit objects to such omission, then the plaintiff has no substantive right to proceed without bringing in the omitted party, even though to do so would destroy the jurisdiction of the court.

In the case of *Camp* v. *Gress* (*supra*), the court quoting with approval from *Strawbridge* v. *Curtiss*, 3 Cranch. 267, 2 L. Ed. 435, said:

> "That where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those Courts (Courts of the United States)."

The Court in that case said:

> "First. The several defendants below although not citizens of the same State were all citizens of states other than that of the plaintiff. Hence, the diversity of citizenship requisite to Federal jurisdiction existed."

In this case of *Camp* v. *Gress*, there was a suit against a number of joint obligors, all of whom were served and brought into court. One of the defendants claimed the privilege of being sued in his own district. This was allowed and the case proceeded against the other obligors. It must be noted, however, that the court before passing on the question at all, first determined if there was diversity of citizenship between the parties as to the joint interest.

There seems to be no question but what at common law all joint obligors must be made parties defendant in common law suits. 1 C. J. 127; 1 C. J. 137; 9 C. J. 91; and 11 C. J. S. 476.

So we see that where an indispensable party is omitted, there is no question of Federal jurisdiction involved, even though the bringing in of such party would destroy the requisite diversity of citizenship. This is because where such a party is omitted, no court could enter a decree. In other words, a Federal Court determines whether or not it has power as a court to enter a decree, and then whether or not it has power as a Federal court to enter a decree. If it has no power as a court to enter a decree,

then it is not necessary to consider the question as to whether or not it has Federal jurisdiction. Since no court either Federal or State has power as a court to enter a judgment where an indispensable party is omitted, then it is not necessary for a Federal court in such a case to determine the question as to whether or not it has Federal jurisdiction, and, therefore, no question of Federal jurisdiction is involved as was held in *Bogart* v. *Southern Pacific Co.* (*supra*). In such a case, it would be useless to remand the case to the State Court from which it was removed because the State Court, as a Court, would have no power to enter a judgment, and so the case should be dismissed.

In a case, however, where one of two joint obligors is sued the Court as a Court does have power to enter judgment against the one obligor sued, because the omitted obligor is not an indispensable party, and, therefore, it is necessary in such a case that a Federal Court determine the question as to whether or not it has Federal jurisdiction. In such a case, the plaintiff has no substantive right to proceed against the one obligor in the absence of the other, not because the omitted obligor is an indispensable party, but because the contract sued upon does not give him such a right. In other words, the right of the plaintiff depends upon the inclusion of the omitted joint obligor as a defendant, and therefore, the controversy is between the plaintiff and both obligors. In such a case, it makes no difference whether the parties are parties to the suit or not. The controversy is between the joint obligors and the plaintiff, and there must be diversity of citizenship between all of them. It was for this very reason that in the case of *Camp* v. *Gress* (*supra*), the Court first determined that there was diversity of citizenship between all parties concerned before dismissing the cause as to one joint obligor under a Federal statute permitting the same.

Restating the above, no Court as a Court can enter a judgment where an indispensable party is not in the suit. Any Court can enter a judgment against one of two joint obligors in the absence of the other where the one against whom the judgment is entered does not properly object thereto, because the omitted obligor is not an indispensable party, provided it has jurisdiction of the subject matter. A Federal District Court only has jurisdiction of the subject matter in a suit against one of several joint obligors where there is diversity of citizenship between the plaintiff and all of the joint obligors, except in cases where Congress has by statute conferred jurisdiction otherwise, as was done under the Statute of February 28, 1839. In the case at bar, the statute of February 28, 1839, has no application whatsoever because the appellants were inhabitants of the district where the suit was brought, and could be and were actually found in said district. As a consequence, the law in the case at bar applicable, is that law which applied prior to the passage of said Act of February 28, 1839.

The judicial power granted in the Constitution of the United States extends to "controversies between citizens of different States", Article III, Section 2, Clause 1. The Federal Statute conferring jurisdiction upon United States District Courts, likewise confers jurisdiction over such controversies subject to limitations as to the amount involved. A plaintiff has no substantive right to sue one of two joint obligors over the objection of the one sued, and the one sued has a substantive right to insist upon the other jointly liable with him being joined in the suit. Therefore, both joint obligors as a matter of substantive law are parties to the controversy.

Before leaving this question of Federal jurisdiction, we would like to call the attention of the Court to the Removal Statute applicable where there are more than one defendant. 28 U. S. C. A. 71, (Judicial Code 28). The law is too

well settled under this section to require the citation of authorities that one defendant cannot remove the case unless he has a separable controversy. In the case at bar, had the plaintiffs complied with the Florida statute requiring all joint obligors to be made parties defendant in the suit, there could be no question but what the case could not be removed to the Federal Court because no one defendant would have a separable controversy. Such a case was the case of *L. & N. R. R. Co.* v. *Ide,* 114 U. S. 52, 29 L. Ed. 63, 5 Sup. Ct. 735. The Court there said:

> "Here it is certain joint contracts entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible."

We would also like to call the attention of the Court to the Statute 28 U. S. C. A. 80, 5th Section of the Act of March 3, 1875 (18 Stat. 472), which requires that a suit be remanded to the Court from which it was removed in the event it appears to the District Court that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case removal to the Federal Court. In the case at bar, the plaintiffs illegally and improperly sued in a State Court of the State of which the plaintiffs were citizens, one of several joint obligors which was a corporation of another State. This joint obligor removed the case to the Federal Court, and after removing it, brought in as third-party defendants the remaining obligors jointly liable with the original defendant who were all citizens of the same state as the plaintiff. Certainly, such action upon the part of the plaintiffs in suing only one defendant, and upon the

part of the one defendant in removing the case and bringing in the third-party defendants, creates a prima facie case of collusion between the parties for the purpose of creating jurisdiction of the Federal District Court. To say the least, such action upon the part of the parties to the original suit requires some explanation.

The Circuit Court of Appeals in its opinion in this case held that the sole defendant, the Surety Company, by failing to plead the non-joinder of the Third-Party Defendants, the petitioners in this cause, waived its right to object thereto, and thereby jurisdiction was conferred upon the District Court. This might have been true had not the Third-Party Defendants been brought in. They were brought in in order that they would be bound by the judgment against the sole defendant in the original suit. In order to bind these Third-Party Defendants, however, they must have the right to plead any defense which the original defendant could plead. They plead their own non-joinder in the original suit as defendants, questioning both the jurisdiction of the Court as well as the substantive right of the plaintiffs to proceed against the sole defendant. The Circuit Court of Appeals completely ignored the pleadings of the Third-Party Defendants in this regard, thereby binding the Third-Party Defendants by the judgment in the original suit, and at the same time granting them no privilege of pleading in said suit. The practical effect of the decision of said Circuit Court is to allow the Third-Party Defendants to plead any defense they have to the bond, with the exception of the one defense which they did plead, to-wit, their own non-joinder as defendants in the original suit. It is the contention of these petitioners filing this brief, that if they as Third-Party Defendants are deprived of the right of filing any defense which the original defendant could have filed in the original suit, then they as Third-Party Defendants cannot be bound by the judgment in the original

suit without violating the due process clause of the Constitution of the United States.

Question No. 2.

In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the court disregard the non-joiner of said Third Party Defendants as original defendants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

This question assumes that the District Court did have jurisdiction as a Federal Court, but questions the substantive right of the plaintiffs to recover.

The first part of the argument under the first question, set forth in this brief hereinabove concerning the substantive rights of the parties, is applicable to this second question, and is again set forth under this second question in a more compact form for the convenience of the Court.

The liability of the obligors in the bond sued upon is joint (R. 11, for form of bond).

9 C. J. 37; 11 C. J. S. 426;

Florida School-Book Depository, Inc. v. *Lidden* (Fla.), 153 So. 902;

Fidelity & Deposit Company of Maryland v. *Aultman* (Fla.) 50 So. 991;

Pickersgill v. *Lahens,* 15 Wall. 140, 21 L. Ed. 119.

Under the law of Florida all joint obligors must be sued whether they can be served or not; they must at all times be parties defendant in the suit; and a judgment can only be entered against less than all of the joint obligors, provided, the judgment finds from the sheriff's return that those joint obligors omitted from the judgment were not residents of the county.

Section 4496, of the Compiled General Laws of Florida for 1927;

Davis v. *First National Bank & Trust Company in Orlando* (Fla.), 150 So. 633;

Nelson v. *Ziegfeld* (Fla.), 131 So. 316.

Under the law of the United States, one of several joint obligors can only be sued where the omitted obligors are not inhabitants of, or cannot be found within the district where the suit is brought.

28 U. S. C. A. 111 (Judicial Code 50);

Clearwater v. *Meredith,* 21 How. 489, 16 L. Ed. 201.

Under the common law rule the plaintiff could not recover except against all of the joint obligors, and all had to be sued.

1 C. J. 127; 1 C. J. S. 137;

9 C. J. 91; 11 C. J. S. 476.

Under Rule 19 (c) of the New Rules of Civil Procedure for Federal District Courts, a plaintiff in his pleading is required to state why he omits as a party any person who ought to be a party if complete relief is to be accorded. Such was not done in the case at bar.

In the case of *Gilman* v. *Rives,* 10 Peters 298, 9 L. Ed. 432, a declaration was filed against one of two joint judgment debtors both of whom were alive and within the juris-

diction of the Court. A demurrer was filed to the declaration and the same was sustained. The Supreme Court in this case said:

> "The sole question in the case is whether the action was maintainable against the defendant, Rives, alone; the judgment appearing on the face of the declaration to be a joint one against him and Lyne, and no reason being assigned in the declaration why Lyne was not made a party thereto. If it had appeared upon the face of the declaration that Lyne was dead, or out of the jurisdiction of the Court, or incapable of being made a party to the suit, there is no doubt that the action might well be maintained against the other judgment debtor.
>
> The question then is, whether the non-joinder of Lyne, as a Co-defendant, and the omission to aver any reason for such non-joinder, is a fatal defect, upon a general demurrer to a declaration thus framed. The matter might, without doubt, have been pleaded in abatement; and not having been so pleaded, it is contended that it cannot be taken advantage of upon general demurrer."

The Court further says in said case:

> "But if it should appear upon the face of the declaration, or other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, the Court will arrest the judgment, and the objection may be taken by demurrer; because the plaintiff himself shows that another ought to be joined, and it would be absurd to compel the defendant to plead facts which are already admitted."

Further quoting from this case, we find

> "As a question, therefore, of authority, the doctrine seems well settled, and we cannot say that upon principle there is not good sense in requiring the plaintiff in his suit to assign some reason why, when he declares upon a joint judgment, he does not join others whom he states in his declaration to be jointly liable."

Conclusion.

Summarizing this entire brief, the District Court was without Federal jurisdiction over the suit, which was a controversy over or had as its subject matter a joint obligation, because there was no diversity of citizenship between the parties to such joint obligation, and, although there was diversity of citizenship between the parties to the suit—all of the parties to the joint obligation not being parties to the suit—yet this did not cure the lack of Federal jurisdiction, inasmuch as there was no Federal statute enlarging the jurisdiction of the District Court to include such a suit, where the omitted parties were inhabitants of and could be found within the district, as was the case in the suit, and, inasmuch, as the substantive right of the plaintiffs to recover depended upon the presence of such omitted parties in the suit; but even if the District Court had Federal jurisdiction over the suit, the plaintiffs had no substantive right to recover because their suit was based upon a several liability of a sole defendant, whereas, their substantive right to recover showed the liability of the defendant to be joint with and not several from that of parties who were not parties to the suit.

The Circuit Court of Appeals decided the above questions by holding them to have been waived, because the sole defendant in the original suit did not plead them, thereby in effect holding that a Third Party Plaintiff can waive the right of the Third Party Defendant to plead that which Rule 14, of the Rules of Civil Procedure for District Courts grants a Third Party Defendant the privilege of pleading. Such holding of said Circuit Court ignores the fact that the Third Party Defendants did actually plead that which had been waived by the Third Party Plaintiff. It also has the effect of binding the Third Party Defendants with the judgment in the original suit, and at the same time taking from

them their right to plead therein, which is not due process of law.

The writer of this brief entertains the hope that this Court will not think it a misnomer. If he has failed to be brief, it is not because of lack of diligence on his part in an effort to make it so, but rather because of his limited ability with the words at his command to achieve his desired result. He has attempted for the greater part to argue from postulates established by authority. He would think it presumptuous to consider himself a member of that school of intelligentsia which considers it intellectual indolence to take postulates upon authority without inquiring into their worth, and he has, therefore, avoided as much as possible any attempt to expound what he believes to be clearer or truer principles of law than those established by precedents.

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APPENDIX.

Florida Statute Applicable in Cases Where Part of the Defendants Cannot Be Served.

Section 4496, Compiled General Laws of Florida 1927
Article 6.

Judgment Against One In Suit Against Several.

4496. (2809.) Proceedings. Where suit is brought against two or more defendants, and the summons is served on one or more, but not on all, and the sheriff returns that the defendant not served does not reside in the county, the plaintiff may proceed against the defendant served, noting the fact of non-service on the absent defendant, and if he recover judgment, it may be entered up against the defendant served, noting the fact of non-service as aforesaid, which may be enforced against the property of the defendant against whom the judgment is entered, and the joint property of the defendants named in the writ; nothing herein shall be construed to prevent the plaintiff from bringing suit thereafter against any defendant not served for the same claim or demand; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action. Or the plaintiff may, at his option, order additional originals and copies to be directed to the sheriffs of the counties in which the other defendants reside to be served and returned according to law.

(23)

No. 1228

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, the wife of said ROBERT R. WILLIAMS, and formerly ANNA M. PERRY, JOHN W. DuBOSE and RALPH B. FERGUSON,

Petitioners,

v.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation,

Respondents.

BRIEF OF RESPONDENTS KENNETH S. KEYES, ALEX M. BALFE, and C. D. VAN ORSDEL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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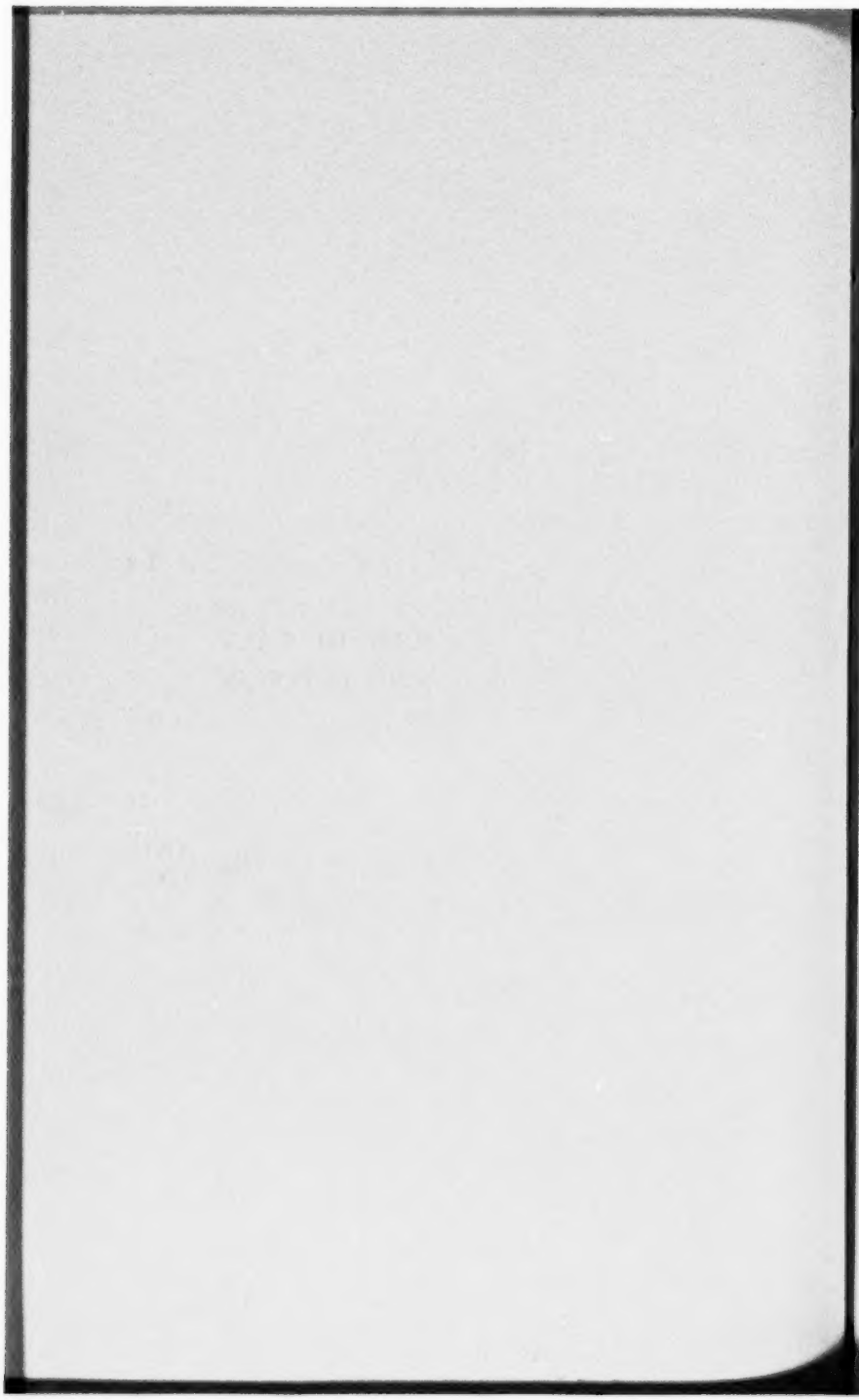

INDEX

	Page
STATEMENT OF THE CASE	1-4
SUMMARY GOVERNING POINTS OF FACT AND LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	5-7
ARGUMENT—QUESTION 1	8-11
QUESTION 2	12-15
CONCLUSION	22-24

ALPHABETICAL LIST OF AUTHORITIES CITED

Page

American Bonding & Trust Co. of Baltimore City v. Milwaukee Harvester Co. (Md.) 48 Atl. 72..... 19

James C. Babbitt, etc., v. John Shields and John Finn, 101 U. S. 7, 25 L. Ed. 820 (page 822).....19-20

Bossard et ux v. McGwinn et al., 27 Fed. Supp. 412.. 9-11

Cozine et al. v. Randolph et al., 71 Fla. 603, 72 So. 177 20

Florida Schoolbook Depository, Inc. v. Liddon, 114 Fla. 378, 153 So. 902-903.....20-21

Magnum Import Company v. Houbigant, Inc., 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (Page 924) 5-6

Mariposa County v. Knowles, (Cal.), 79 Pac. 525.... 17

Morrison vs. American Surety Company of New York (Penn.), 73 Atl. 10, (Page 11).....18-19

Nelson v. Ziegfield, 100 Fla. 1433, 131 So. 316..... 20

Riley vs. Jarvis, et al (W. Va.) 26 S. E. 366.....17-18

Sklar et ux. v. Hayes (Singer, Third Party Defendant), 1 Federal Rules Decisions, 415 (416).. 8-9

United States ex rel. Louisiana v. Jack, 61 Law Ed. 1222, 244 S. W. 397, (Page 402).....22-23

Yadusky et al. v. Shugars, et al. (Penn.) 151 Atl. 785 19

TEXT BOOKS

American Jurisprudence, Volume 3, pages 46 & 47..12-13

Rules of Civil Procedure (Rule 14).....13-14

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, the wife of said ROBERT R. WILLIAMS, and formerly ANNA M. PERRY, JOHN W. DuBOSE and RALPH B. FERGUSON,

Petitioners,

v.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation,

Respondents.

BRIEF OF RESPONDENTS KENNETH S. KEYES, ALEX M. BALFE, and C. D. VAN ORSDEL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

By reason of certain inaccuracies and omissions in the Statement of the Case made in the petition for certiorari and the brief in support thereof, we will file a supplemental Statement of the Facts.

The designation of parties adopted in Petitioners' brief will be followed herein, namely: the Petitioners who were Third Party Defendants will sometimes be referred to in this brief as Third Party Defendants. The respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL were Plaintiffs in the trial

court, and will be so referred to herein. The respondent, United States Fidelity and Guaranty Company was Defendant in the trial court and will be so referred to herein.

The Circuit Court of Dade County, Florida, entered its final decree ordering a recall election of three commissioners of the City of Miami, Florida, to-wit: ROBERT R. WILLIAMS, JOHN W. DuBOSE and RALPH B. FERGUSON, in a suit brought by the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL, against the City Commissioners and the Clerk of the City of Miami, Florida. An appeal from said final decree was taken to the Supreme Court of Florida and a Supersedeas Bond was given. The bond was signed by Robert R. Williams, *as Mayor-Commissioner,* John W. DuBose, Ralph B. Ferguson and Anna M. Perry, respectively *as Commissioners of the City of Miami, Florida,* as Principals, and the United States Fidelity and Guaranty Company, as Surety, (Tr. 12). The Supreme Court of Florida affirmed the decree ordering the recall election. *(186 So. 250).* The recall election was held and the said three commissioners were recalled. Thereafter, this action was instituted in the State Court by the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. Van ORSDEL, against the Respondent, United States Fidelity and Guaranty Company, as Surety upon said Supersedeas Bond, for having failed to pay the damages sustained by them by reason of the appeal to the Florida Supreme Court. Thereupon, the said defendant, United States Fidelity and Guaranty Company, because of the diversity of citizenship, removed this action to the United States District Court, in and for the Southern District of Florida.

Before pleading to the declaration, the defendant surety company filed a Third Party complaint against ROBERT R. WILLIAMS, JOHN W. DuBOSE, RALPH B. FERGUSON and ANNA M. PERRY, and the CITY OF MIAMI, FLORIDA, a municipal corporation *(Tr. 16)*. This Third Party complaint set out an Indemnity Agreement between the above-named persons and the defendant whereby they agreed to indemnify the defendant in the event it became liable on said bond; and, asked for a judgment against the Third Party Defendants for any amount which the Plaintiff might recover against it in this suit. Thereupon, said persons as Third Party Defendants moved the Court to remand the action to the State Court and dismiss the plaintiffs' action on the ground of lack of jurisdiction and failure of the declaration to state a claim *(Tr. 51-52)* which motion to remand was denied*(Tr. 54-55)*. The motion to dismiss was not ruled upon. Upon motion of the defendant, the City of Miami was dismissed, no service of process having been obtained upon it. The Third Party Defendants filed no further pleadings. The case came on for trial upon the answer of the surety company. Verdict was rendered by the Jury and judgment entered by the Court on Plaintiffs' declaration against said Defendant (Tr. 58, 59 & 60). Final judgment was also entered against the Third Party Defendants in favor of the Third Party Plaintiff *(Tr. 60-61)*. No appeal was taken to the Circuit Court of Appeals by the defendant surety (Plaintiffs' sole judgment debtor) from the Plaintiffs' judgment but an appeal was taken by said Third Party Defendants from both of said judgments *(Tr. 62)*.

The Circuit Court of Appeals for the Fifth Circuit affirmed both of said judgments. *(125 Fed. 2d 208)*.

The principal inaccuracy of Petitioners' Statement of the Case consists of repeated references to the Third

Party Defendants as being the principals on the surety bond upon which the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. Van ORSDEL, brought their action in the State Court. It will be noted, however, from our Supplemental Statement and the transcript references that the bond was signed by certain principal parties in their representative capacity *as officials of the City of Miami, Florida,* whereas, they were made Third Party Defendants, not in an official capacity, but as individuals upon an Indemnity Agreement, which Indemnity Agreement was executed not as officials of the City of Miami, Florida, but as individuals, (Tr. 21-43 inc.)

The vital omission in Petitioners' Statement of the Case consists in its failure to advise this Court that the Defendant Surety who is sole judgment debtor in the judgment of the respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL did not appeal from the judgment; and it will be noted that it has not filed a petition for certiorari in this Court.

SUMMARY COVERING POINTS OF FACT AND LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The two questions presented by Petitioners' brief assume that the Supersedeas Bond created a joint liability of the principals and the surety which was one of the propositions of law presented to the District Court and Circuit Court of Appeals and found contrary to Petitioners' contention.

Furthermore, the Circuit Court of Appeals found that even though the obligation was joint, the Federal Court had jurisdiction because at the time of removal the cause stood bona fide as one between resident plaintiffs and a single non-resident defendant.

Summarizing the propositions of law as applied to the facts, we submit:

FIRST: Appeal to the Circuit Court was not taken by these respondents' judgment debtor, and said judgment is not reviewable at the instance of the petitioners who are not parties to these respondents' judgment. (Argued under conclusion, pages 22, 23.)

SECONDLY: It affirmatively appears from the facts which are correctly recited in the opinion of the Circuit Court of Appeals that no question is involved which would warrant the granting of the petition for certiorari.

In support of this proposition, we submit the opinion reported in *125 Fed. 2d 208*, also transcript, pages 78 to 81, inclusive, and the opinion of Mr. Chief Justice Taft, in the case of *MAGNUM IMPORT COMPANY v. HOUBIGANT, INC.*, reported in *262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922*, wherein he said (Text 924):

> "***The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uni-

formity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

(Argued under Question 1, pages 8 to 11.)

On the question of the correctness of the decision of the District Court and the Circuit Court of Appeals, we summarize the propositions of law involved as follows, to-wit:

I.

The District Court properly refused to grant the motion to remand the case to the State Court, in which case the Obligees in a Supersedeas Bond, as Plaintiffs, made the surety the sole defendant, and the surety removed the case to the District Court on the ground of diversity of citizenship, and thereafter brought in Third Party resident defendants seeking judgment against them on an Indemnity Agreement.

Federal jurisdiction attached when the case was pending between resident plaintiffs and a single non-resident defendant, and the fact that residents of the same state as of the Plaintiffs were brought in as Third Party Defendants subsequent to the removal did not divest the Federal Court jurisdiction. (Argued under Question 1, pages 8 to 11.)

II.

The Obligees in a Supersedeas Bond instituted this action in a State Court of Florida against the surety who removed the case to the Federal Court on the

ground of diversity of citizenship and brought in Third Party Defendants alleging them to be indemnitors which said Third Party Defendants filed their motions to dismiss the action on the ground that the Plaintiffs should have instituted their action jointly against the principals and surety on the bond—the bond providing that certain persons as principals and X surety company as surety are held and firmly bound unto the Obligees for payment of which the undersigned principals and surety firmly bind themselves by these presents—the lower court entered no order on the motion to dismiss. Petitioners contend that the final judgment was in effect a denial of such motion.

(a) Assuming that the bond was joint and that the action in the State Court should have been against both principals and surety, when the case was removed to the Federal Court under the Third Party Rule, the Third Party Defendants were then in a position to assert any defenses which they could have asserted had they been originally made joint defendants. (Argued under Question 2, pages 13 to 15.)

(b) The obligations of the surety in said bond created a several liability. (Argued under Question 2, pages 16 to 21.)

(c) The Petitioners (Third Party Defendants in the District Court) by not obtaining a ruling on their motion to dismiss waived their right to have this question reviewed by this Court. (Argued under Question 2, pages 12 to 13.)

The above propositions of law, numbered I and II, give rise to two questions which are respectively set forth as Questions 1 and 2, and for the sake of brevity, will only be quoted in the Argument.

ARGUMENT

QUESTION I:

WHERE OBLIGEES IN A SUPERSEDEAS BOND, INSTITUTED SUIT AGAINST THE SURETY ALONE IN THE STATE COURT OF FLORIDA TO RECOVER DAMAGES COVERED BY THE BOND, AND THE SURETY REMOVED THE CASE TO THE UNITED STATES DISTRICT COURT ON THE GROUND OF DIVERSITY OF CITIZENSHIP AND THEREAFTER BROUGHT IN THIRD PARTY DEFENDANTS SEEKING JUDGMENT AGAINST THEM ON AN INDEMNITY AGREEMENT, (SAID THIRD PARTY DEFENDANTS LIKE PLAINTIFFS WERE RESIDENTS OF FLORIDA)—SHOULD THE LOWER COURT HAVE GRANTED A MOTION TO REMAND THE CAUSE FILED BY THE THIRD PARTY DEFENDANTS ON THE GROUND THAT THE LIABILITY OF THE PRINCIPALS AND SURETY WAS JOINT?

Irrespective of whether the obligation of the bond be joint or several, the Federal Court properly exercised its jurisdiction in refusing to remand to the State Court. The Third Party Defendants were brought into Court, by the original defendant and judgment sought against them on an Indemnity Agreement (Tr. 16-43). With this quarrel, the original plaintiffs had nothing to do or say.

This point of jurisdiction was squarely decided in the case of *SKLAR et ux. v. HAYES (Singer, Third Party Defendant), 1 Federal Rules Decision, 541.* We quote from the Opinion therein, page 416, to-wit:

> "(2-4) The further objection that the lack of diversity of citizenship between the plaintiffs and the third-party defendant prevents the introduction of the latter into the suit cannot be

sustained. Such an objection is not well founded, as it appears that the causes of action set forth in these third-party complaints are ancillary or auxiliary to those in the original complaints and so these third-party complaints need not set forth independent grounds of jurisdiction. Since the Federal Rules of Civil Procedure became effective it has been generally held that controversies presented by third-party complaints are properly within the jurisdiction of the court. See Bossard v. McGwinn et al., D. C., 27 F. Supp. 412; Morrell v. United Air Lines Transport Corporation, D. C., 29 F. Supp. 757, 759; Crum v. Appalachian Electric Power Co. et al., D. C., 29 F. Supp. 90, 91; Gray v. Hartford Accident & Indemnity Co. D. C., 31 F. Supp. 299, 305. To regard such controversies otherwise would be to defeat the purpose of the rule—which is to avoid circuity of action and to adjust, in a single suit, several phases of the same controversy as it affects the parties. Holtzoff, 'New Federal Procedure and the Court,' P. 49."

The District Court's refusal to remand this cause is thus substantiated by all the adjudicated cases and by logic and reason. The surety company admitted that the plaintiffs had a separable cause of action against it when it removed the case to the Federal Court; and, to allow the Third Party Defendants who had no interest in the controversy between the plaintiffs and the surety company to remand this cause would be to defeat the federal jurisdiction of the main suit by an ancillary or auxiliary one.

The case of *BOSSARD et ux. v. McGWINN et al., 27 Fed. Supp. 412*, was relied upon by the District Judge in writing the Opinion above quoted from and presents facts analogous to this case. We quote therefrom (pages 412-413), to-wit:

"This is an action originally brought in the court of Common Pleas of Erie County, Pennsylvania, by plaintiffs to recover from the defendant McGwinn damages for personal injuries alleged to have been received by plaintiff, Elsie M. Bossard, when she was riding as a passenger in an automobile owned and operated by the third party defendant Siegel, which came into collision with an automobile driven by the defendant McGwinn. The collision, Mrs. Bossard alleged, was caused by the negligence of the defendant McGwinn.

"McGwinn is a citizen of the State of Ohio. The amount in controversy is over $3,000 exclusive of interest and costs. On the petition of McGwinn the case was removed into this court.

"Whereupon, the defendant McGwinn filed a motion in this court under Rule 14 (a) of the New Rules for Civil Procedure, 28 U.S.C.A. following section 723c, to make John W. Siegel, the driver of the car in which the Plaintiff, Elsie M. Bossard, was riding at the time of the collision, a third-party defendant, and for leave to serve a summons and complaint on John W. Siegel, a person who is not a party to the action, and who is, or may be, liable to the defendant McGwin, or to the plaintiffs for all or part of the plaintiffs' claim against the defendant McGwinn. The Court granted this motion.

"(1, 2) Siegel, a resident of this District, was served with a summons and complaint under this rule, has appeared specially, and moved that the summons and complaint making him a third-party defendant be quashed. This motion to quash is based on the fact that the plaintiffs and the third-party defendant Siegel are both residents of Pennsylvania in this District. Of course, this court would have no original jurisdiction of a suit by plaintiffs against Siegel. As we construe Rule 14 as to third

parties, the third-party claim is not to be regarded as such a claim as requires independent jurisdictional grounds, but as an ancillary claim to the original suit. Before the new rules even, this ancillary jurisdiction was applied in equity in the Federal Court. See Alexander V. Hillman, 296 U. S. 222, 56, S. Ct. 204, 80 L. Ed. 192.***"

Having found no authority to the contrary, we respectfully submit that, regardless of the nature of the obligation of the bond, the situation of bringing in the indemnitors on the bond as third-party defendants, presents an ancillary controversy which is exactly the reason why the third-party rule was designed and adopted.

QUESTION II:

OBLIGEES IN A SUPERSEDEAS BOND INSTITUTED ACTION IN THE STATE COURT OF FLORIDA AGAINST SURETY WHO REMOVED THE CASE TO THE FEDERAL COURT ON THE GROUND OF DIVERSITY OF CITIZENSHIP AND BROUGHT IN THIRD PARTY DEFENDANTS ALLEGING THEM TO BE INDEMNITORS WHICH THIRD PARTY DEFENDANTS FILED THEIR MOTION TO DISMISS THE ACTION ON THE GROUND THAT THE PLAINTIFFS SHOULD HAVE INSTITUTED THEIR ACTION JOINTLY AGAINST THE PRINCIPALS AND SURETY ON THE BOND—THE BOND PROVIDING THAT CERTAIN PERSONS AS PRINCIPALS AND "X" SURETY COMPANY AS SURETY ARE HELD AND FIRMLY BOUND UNTO OBLIGEES FOR PAYMENT OF WHICH THE UNDERSIGNED PRINCIPALS AND SURETY FIRMLY BIND THEMSELVES BY THESE PRESENTS—THE LOWER COURT ENTERED NO ORDER ON MOTION TO DISMISS. APPELLANTS CONTEND THAT FINAL JUDGMENT WAS IN EFFECT A DENIAL OF SUCH MOTION—IF SO, WAS THIS REVERSIBLE ERROR?

It is our purpose to present argument upon the points of law covered by the above question but before doing so we respectfully direct the Court's attention to the fact that the motion to dismiss was not ruled upon by the District Court; therefore, this question was not preserved for review upon appeal. As authority, we quote *from AMERICAN JURISPRUDENCE, Volume 3, pages 46 and 47* to-wit:

> "Sec. 270. GENERALLY; NECESSITY.—In order that a question may be preserved for review upon appeal, it is generally necessary that there be an actual ruling upon the point. If a

party permits the court to proceed to judgment without action upon his motion or objection, he will be held to have waived the right to have the same acted upon."

We now proceed with the propositions of law covered by the above question:

ASSUMING THAT THE BOND WAS JOINT AND THAT THE ACTION IN THE STATE COURT SHOULD HAVE BEEN AGAINST BOTH PRINCIPALS AND SURETY, WHEN THE CASE WAS REMOVED TO THE FEDERAL COURT UNDER THE THIRD-PARTY RULE, THE THIRD PARTY DEFENDANTS WERE THEN IN A POSITION TO ASSERT ANY DEFENSES WHICH THEY COULD HAVE ASSERTED HAD THEY BEEN MADE JOINT DEFENDANTS.

The purpose of the technical requirement of the common law that all persons jointly liable should be made defendants was to permit either of the obligors to assert any defense which he might have to the obligees' claim, which defense would defeat recovery as to all. Rule 14 of the *"RULES OF CIVIL PROCEDURE"*, provides as follows, to-wit:

"(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defense as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff,

> the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the Plaintiff or to the third-party plaintiff.******"

Petitioners ground their entire argument upon the premise that "Rule 14, of said Rules of Civil Procedure, does not give the privilege to Third Party Defendants to plead any defense, but only that defense which the Third Party Plaintiff might plead to the original claim." That contention is in the teeth of the finding of the Circuit Court of Appeals, to-wit:

> "(3, 4) In the case at bar the rights of the third-party defendants were in no way prejudiced by removal of the cause to the federal court. Outmoded technicalities and refinements of procedure no longer obtain in federal courts; the object of the new rules being to facilitate the trial and disposition of causes and all matters in controversy upon their merits. Here appellants were properly before the court under the provisions of Rule 14(a), 28 U.S.C.A. following section 723c. They could have interposed any defenses they had, or that the defendant surety company had, and failing to there and then avail themselves of these rights they may not now be heard to complain."

The above rule says specifically "the Third Party Defendant shall make his defense *** and may assert any defenses which the Third Party Plaintiff has to the Plaintiff's claim." Most assuredly, the meaning of this portion of the rule is clear and any defense which the said Petitioner had should have been interposed by him

whether it was direct or whether conferred through the Third Party Plaintiff, but as a factual matter, if the bond was joint as they insistently urge, any defense was available to the Third Party Defendant and the Third Party Plaintiff. On the other hand, if the bond was several, then this question does not arise. Accordingly, there could have been no denial of due process of law.

Said in another way, the error, if any, in not suing the principals and the surety jointly upon the Supersedeas Bond was cured when the defendant surety company brought in the Petitioners as Third Party Defendants. It would indeed be an incongruous anomaly to allow a third party defendant who is properly in Court to complain of the fact that a judgment was not entered against him. Plaintiffs obtained a judgment against the Defendant; the latter, as Third Party Plaintiff, obtained a judgment against the Third Party Defendants, and is certainly not complaining because it did not appeal from the Plaintiffs' judgment, so the Petitioners' argument resolves itself into a reductio ad absurdum—that they could have defended but they did not defend and now say that the Plaintiffs' judgment was not against them also. We submit that our contention in this regard is tenable and correct.

THE OBLIGATIONS OF THE SURETY IN SAID BOND CREATED A SEVERAL LIABILITY.

The terms of the bond indicate clearly that it was a joint and several bond. We quote from the Bond, as follows:

> "KNOW ALL MEN BY THESE PRESENTS, that Robert R. Williams, John W. DuBose, Ralph B. Ferguson and Anna M. Perry, as the City Commissioners of the City of Miami, Florida, *as Principals,* and United States Fidelity and Guaranty Company of Baltimore, Maryland, *as surety,* a surety company authorized to do business in the State of Florida, are held and firmly bound unto Kenneth S. Keyes, Alex M. Balfe and C. D. Van Orsdel, in the sum of Five Thousand Dollars ($5,000.00) for the payment of which well and truly to be made, the undersigned *Principals* and *Surety* firmly bind themselves by these presents.
>
> *****
>
> "The Condition of This Obligation Is Such That, Whereas, the above named plaintiffs on the 10th day of November, 1938, obtained a final decree ..... duly recorded in Chancery Order Book ....., page ....., in the office of the Clerk of the Circuit Court of Dade County, Florida, *against the defendants as the City Commission* of the City of Miami, Florida, as above named;
>
> *****
>
> "Now, Therefore, if the said Final Decree heretofore made and rendered in this cause shall be affirmed by the Appellate Court, or said appeal be dismissed, *and the defendants shall well and truly pay to the Plaintiffs* the cost of the suit now pending in the Circuit Court and in the Appellate Court, together with a reasonable Attorney's fee for the Plaintiffs for services performed in the appeal to the Supreme Court

> from the Final Decree heretofore entered in said cause, then this obligation shall be null and void, otherwise, to be and remain in full force and effect."
>
> (*Italics Ours*)

Nothing in the above quoted language expressly or impliedly makes this a joint obligation; on the contrary it binds respectively certain named persons as principals and another as surety for the payment. The last clause means that the principals as one class bind themselves and the surety as another class binds itself to the conditions of the bond. Indeed, the condition of the bond is that if the defendants to the recall suit shall well and truly pay the plaintiffs the cost of the suit and the cost on appeal, then the bond should become void, otherwise, the surety obligated itself distinctly to pay individually and severally under the bond. The surety did not bind itself to pay until the defendants in the recall suit had defaulted in the terms of the bond. This was a separate, several and distinct promise to pay an obligation on the part of the surety. If it had been solely a joint bond why were the parties designated separately and why did they bind themselves to do different things?

In the case of *MARIPOSA COUNTY v. KNOWLES*, (Cal.), 79 *Pac.* 525, that Court held:

> "Where by the terms of a bond the Principal and Surety is bound in the sum specified, the bond is joint and several for that sum whether it is so stated or not."

In *RILEY v. JARVIS, et al.*, (*W.Va.*), 26 *S. E.* 366, the following is found:

> "Where the Surety does not sign the note but puts a memorandum at its foot that he binds himself as surety for the payment of the note

> it is the same. The obligation is joint and several. Hunt v. Adams, 5 Mass. 358. Wilson v. Campbell 1 SCAM 493."

The same situation exists in this case. The Surety did not sign the bond as Principal but plainly throughout the bond wherever its name is mentioned it is definitely stated that it is bound only as the Surety. The obligations of the Principal and Surety are not joint in this suit but are entirely separate and distinct—That of the Principals is to pay the costs, in the Lower Court and in the Appellate Court, of the recall suit, and that of the Surety is to pay in event of the default of the Principals to pay the costs.

See *MORRISON vs. AMERICAN SURETY COMPANY OF NEW YORK* (*Penn.*), 73 *Atl.* 10, where the following is found: (Page 11)

> "The obligors primarily do not declare in the bond that they are 'jointly' liable nor do they use any similar language which shows that their undertaking is a joint one. When, however, in the subsequent part of the bond, they state the character of their liability, they employ language which expressly declares that each is liable on the obligation. 'The principal binds himself' and the 'said surety binds itself' is the language of the instrument. It will be observed that these words disclose more clearly an intention on the part of the obligors to assume a several liability than the words used in many of our cases, quoted above, and which we have declared do create a severance. In those cases the singular number, and the words 'each', 'every', 'respectively', and 'several' were the effective words in the instrument to create the severance. Here, in language much more direct and forceful than those words, it is declared that the 'principal binds himself', and the 'said surety binds itself'. This is a declara-

> tion of a distinct and separate obligation by each obligor for the payment of the sum named in this instrument. The principal assumes the obligation imposed by the contract, and the surety likewise. Each in a separate capacity, as the language clearly shows. In effect the bond declares we are held and firmly bound in the sum of ..... dollars, for the payment of which each obligor is responsible. By the covenant of the parties each assumed a separate obligation to pay the sum named in the bond, and thus, under our decisions, a joint and several obligation is imposed on which an action will lie against both or either of the obligors."

See also *AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY v. MILWAUKEE HARVESTER CO.* (*Md.*), 48 *Atl.* 72; *YADUSKY, et al. v. SHUGARS, et al.* (*Penn.*) 151 *Atl.* 785.

If the instrument was only a joint one the parties would not have bound themselves as Principals and Surety to pay the sum of Five Thousand Dollars ($5,000.00), but would have bound themselves to pay this sum—in other words, all of the signers would have been principals. Their obligations were separate and distinct, the obligation of the Surety being contingent on a default of the Principals, and since this is so there surely could not have been a joint obligation only.

The UNITED STATES SUPREME COURT in the case of *JAMES C. BABBITT, etc., v. JOHN SHIELDS and JOHN FINN,* 101 *U. S.* 7, 25 *L. Ed.* 820, on page 822, had this to say on this question:

> "It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal.

> When they execute the bond, they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties, proprio vigore become liable to the same extent as the principal obligor."

There is no case cited in the brief of Petitioners wherein any Court construed a bond having the same wording as the bond in the instant case to be such a joint undertaking so as to require the declaration to be framed against the Principals and Surety.

Inference is made by Petitioners that the injunction bond in the case of *NELSON v. ZIEGFELD*, 100 *Fla.* 1433, 131 *So.* 316, was the same kind of bond as is here involved. Such is not true because the Nelson case was an assumption by two persons of certain mortgage notes. There was no surety relationship involved. The Supreme Court of Florida has held what to our minds is convincing on this point, and when presented squarely, we believe it will hold that a surety on a supersedeas bond is severally liable. We refer to the case of *COZINE et al. v. RANDOLPH, et al.*, 71 *Fla.* 603, 72 *So.* 177, and quote therefrom:

> "Sureties upon a bond may be bound, though the feme covert principal be not bound."

This holding was affirmed in the latter case of *FLORIDA SCHOOLBOOK DEPOSITORY, INC., v. LIDDON*, 114 *Fla.* 378, 153 *So.* 902-903, from which we quote:

> "(1, 2) Sureties upon a bond may be bound though the principal be not bound because the principal named is fictitious or because the

> principal is under some legal disability prohibiting his being bound as such. Cozine v. Randolph, 71 Fla. 603, 72 So. 177. The rule is that one who signs as surety warrants the existence and validity of the obligation of the party named as principal. This is so, although it may transpire that one or more of the signatures of the principals are forged. 8 Am. St. Rep. 247 note."

It would seem to naturally follow that, if a surety is bound, even though the principal be not bound, the mere denomination of one party as principal and another as surety creates a several obligation and either party can be sued without joining the other. We must, therefore, conclude that, inasmuch as the Supreme Court of Florida and the Supreme Court of the United States have held a surety to be bound even though the principal be not bound, it logically folows that the obligation of a surety on a supersedeas bond is several and the obligees were entitled in this case to have sued the surety alone.

CONCLUSION

In one respect at least this case presents a novel proposition—the failure of the judgment debtor to take an appeal and the appeal being taken from that judgment by Third Party Defendants, who were not parties thereto. There is nothing in Rule 14, nor in Rule 74, which gives them the right to appeal from the Plaintiffs' judgment against the Defendant. It is true that Rule 14 provides that the Third Party Defendant is bound by the adjudication of the Third Party Plaintiff's liability to the plaintiff; but this simply means that as between the Third Party Plaintiff and the Third Party Defendants, the Third Party Defendants cannot question an adjudication of liability on the part of the Third Party Plaintiff to the main Plaintiff. The provision of the rule does not mean that the Third Party Defendant is bound *to the Plaintiff* by the adjudication of the Third Party Plaintiff's liability to the Plaintiff. Rule 74 simply provides that parties interested jointly, severally or otherwise, in a judgment, may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately, or any two or more of them may join in an appeal. The mere fact that it says "or otherwise" does not extend the right of appeal to Third Party Defendants from judgments which they are not parties to because the rule is that no one not a party or a privy to the record may appeal. We have found no Statute, Rule or authority in support of such procedure, but to the contrary, find that this Court has held that one not a party to a judgment is not entitled to appeal therefrom.

We quote from *UNITED STATES EX. REL. LOUISIANA v. JACK,* 61 Law Ed. 1222, 244 U. S. 397, page 402:

"With exceptions not even remotely applicable to a case such as we have here it has long been the law, as settled by this court, that 'no person can bring a writ of error (an appeal is not different) to reverse a judgment who is not a party or privy to the record' (Bayard v. Lombard, 9 How. 530, 551, 13 L. ed. 245, 254); and in Re Leaf Tobacco Board of Trade, 222 U. S. 578, 56 L. ed. 323, 32 Sup. Ct. Rep. 833, it was announced in a per curiam opinion, as a subject no longer open to discussion, that *'one not a party to a record and judgment is not entitled to appeal therefrom,'* and that a refusal after decree to permit new parties to a record cannot be reviewed by this court directly on appeal, or indirectly, by writ of mandamus, under circumstances such as were there and are here presented."

(*Italics ours*)

For this reason alone, the petition for certiorari should be denied.

On the question of the correctness of the respective decisions of the District Court and the Circuit Court of Appeals, we conclude by pointing out that the motion to remand was correctly overruled and the Federal District Court properly exercised jurisdiction because the suit by the original Defendant upon Third Party Defendants' Indemnity Agreement constituted ancillary subject-matter which is covered by Rule 14. The motion to dismiss by the Third Party Defendants raising the question of a joint obligation by the principals and surety on the Supersedeas Bond was not ruled upon by the District Court and the question was waived. Treating the final judgment as denying such motion, then it is our position that such Third Party Defendants, because being vested with the right under Rule 14 to present any defenses which they or the original Defendant might have, they, for all practical purposes, were De-

fendants the same as if they had been named as such in the declaration. However, if we be incorrect in these two assertions, we say that the terms of the bond accorded to the Obligees the right to sue the surety without joining the principals and we contend that the use of the terms "principal" and "surety" creates a several obligation, particularly in view of the contingency that the Defendants must default before there is a right of action under the bond.

Respectfully submitted,

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